No. 97-1252

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1252

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

A. 8 U.S.C. 1252(g) Applies To This Case

New 8 U.S.C. 1252(g) (Supp. II 1996), as added by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), is entitled "Exclusive jurisdiction" and states:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien.

Respondents contend that Section 1252(g) does not apply to this case because (1) they were placed in deportation proceedings before IIRIRA's effective date, and (2) they present a constitutional claim. Those arguments lack merit.

1. Respondents' contention that Section 1252(g) does not apply to cases pending when IIRIRA was enacted is contrary to the holding of every court of appeals that has considered the question, including the Ninth Circuit in this case. See Gov't Br. 30; *Auguste* v. *Reno*, 152 F.3d 1325, 1328-1329

(11th Cir. 1998). In arguing that Section 1252(g) does not apply, respondents rely (Br. 39-41) on Section 309(c)(2) and (3) of IIRIRA. That provision authorizes the Attorney General to determine, with respect to a particular deportation proceeding that was pending on the Act's effective date, that *all* of the provisions of Section 1252 will apply. See 110 Stat. 3009-626 (as amended by Pub. L. No. 104-302, § 2(2), 110 Stat. 3657); 8 U.S.C. 1101 note (Supp. II 1996). Respondents contend that Section 1252(g) should not apply to cases pending on the Act's effective date except where the Attorney General invokes Section 309(c)(2) and (3).

Respondents' argument is contrary to the unambiguous directive in Section 306(c)(1) of IIRIRA, which states that Section 1252(g) "shall apply *without limitation* to claims arising from *all* past, pending, or future exclusion, deportation, or removal proceedings under" the Immigration and Nationality Act (INA). 110 Stat. 3009-612 (as amended by Pub. L. No. 104-302, § 2(1), 110 Stat. 3657) (emphasis added); 8 U.S.C. 1252 note (Supp. II 1996); see Gov't Br. 29. Nothing in the text of IIRIRA suggests that the applicability of Section 1252(g) is contingent upon the Attorney General's decision to invoke other provisions of the Act with respect to a particular deportation or exclusion proceeding. To the contrary, the italicized language forecloses respondents' contention that the application of new Section 1252(g) is limited to a subset of pending cases. See H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 221 (1996) ("The jurisdictional bar in new section [1252](g) shall apply without limitation to all past, pending, or future exclusion, deportation, or removal proceedings under the INA.").[1]

---

[1] Contrary to respondents' suggestion (Br. 39-40), there is no logical inconsistency between Congress's decision that the IIRIRA amendment to 8 U.S.C. 1329 should not apply to pending cases (see Gov't Br. 5 n.2), and its unambiguous determination that the new Section 1252(g) should apply. Before IIRIRA, Section 1329 potentially covered a broad range of suits against the government that do not involve removal proceedings.

In addition, respondents' reading of the effective date provision would not obviate the need for eventual judicial resolution of the reviewability issue posed by this case. With respect to deportation proceedings commenced after IIRIRA's effective date, Section 1252(g) unambiguously precludes reliance on any statutory review provision outside Section 1252 itself. As to such cases, moreover, new Section 1252(b)(9) provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. 1252(b)(9) (Supp. II 1996).

Those provisions confirm that a selective-enforcement challenge to any post-IIRIRA deportation charges can be entertained by a court only after entry of a final order of deportation. Respondents contend that the INA should be construed to allow their claim to proceed outside the statutory framework in order to avoid allegedly irreparable injury. For the reasons stated below (at 17-20) and in our opening brief (at 40-44), that rationale lacks merit. But even if it were to be given some credence, the eventual need for judicial resolution of the issue cannot be avoided by holding that Section 1252(g) is inapplicable to pending cases.

2. Respondents also contend (Br. 42) that Section 1252(g) should be declared inapplicable either to "constitutional claims" generally, or to "constitutional claims that would otherwise evade meaningful judicial review." As we explain below (at 12-17), the instant suit does not fall into the latter category. In any event, respondents' proposed limitations

---

Although Congress declined to divest the district courts of jurisdiction over all such pending cases, it chose to give immediate effect to a provision aimed at minimizing judicial disruption of the removal process.

have no basis in the text of Section 1252(g). That Section applies to "any cause or claim by or on behalf of any alien" arising from the commencement or conduct of removal proceedings. Compare *United States* v. *Gonzalez*, 117 S. Ct. 1032, 1035 (1997). Congress's intent to defer review of constitutional claims until the entry of a final order of deportation is made particularly clear by new Section 1252(b)(9), which requires that result for "all questions of law and fact, including interpretation and application of constitutional and statutory provisions." See p. 3, *supra*.[2]

B. 8 U.S.C. 1252(g) Requires Dismissal Of This Suit

1. New Section 1252(g) does not itself define the procedures to be utilized in reviewing deportation proceedings or orders. Rather, Section 1252(g) is an exclusivity-of-review provision. With respect to deportation cases commenced after the effective date of IIRIRA, application of Section 1252(g) is straightforward. It states that review of the deportation process is unavailable "[e]xcept as provided *in*

---

[2] Respondents thus can draw no support from "the entirety of 8 U.S.C. § 1252." Resp. Br. 43. Contrary to respondents' contention (*id.* at 43), new 8 U.S.C. 1252(f) (Supp. II 1996) does not "authorize[] individuals in future proceedings to seek injunctive relief against the operation of the removal provisions." Rather, Section 1252(f) is by its terms a *restriction* on the remedial authority of a reviewing court. See Gov't Br. 32. The final phrase of Section 1252(f)(1), which states that the bar to injunctive relief does not apply "with respect to the application of [8 U.S.C. 1221-1231] to an individual alien against whom proceedings under such part have been initiated," is simply an exception to the general prohibition, not an affirmative grant of authority. See Pet. App. 249a (O'Scannlain, J., dissenting from denial of rehearing en banc). It preserves the power of the court of appeals, on petition for review under the Hobbs Act, to "enjoin" enforcement of a final deportation order. See 28 U.S.C. 2349. Contrary to respondents' suggestion (Br. 45 n.43), the House Report on IIRIRA does not state that *district* courts may issue injunctive relief pertaining to individual aliens; it states that "courts" may do so, see H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 161 (1996), meaning the courts of appeals on petition for review under the Hobbs Act.

this section" (emphasis added). The italicized language refers to 8 U.S.C. 1252(a) and (b) (Supp. II 1996), the provisions of new Section 1252 that authorize judicial review only in the courts of appeals and only after the entry of a final order of removal. See Gov't Br. 30 n.15.

With respect to aliens placed in deportation proceedings before IIRIRA's effective date, judicial review of any final deportation order continues to be governed by former 8 U.S.C. 1105a (1994). That result is compelled by IIRIRA § 309(c)(1)(B), which specifically addresses the application of IIRIRA to aliens placed in deportation proceedings before the Act's effective date and provides, with limited exceptions not relevant here, that "the proceedings (including judicial review thereof) shall continue to be conducted without regard to [the] amendments" made by IIRIRA. 110 Stat. 3009-625; 8 U.S.C. 1101 note (Supp. II 1996); see Gov't Br. 31 n.15. In such cases, the phrase "in this section" in Section 1252(g) can be given effect only by construing it to mean 8 U.S.C. 1105a (1994), which provides for judicial review of deportation orders in cases commenced before April 1, 1997, in the same manner "as provided in" Section 1252(g)—*i.e.*, pursuant to the Hobbs Act. Thus, the approach we advocate is rooted in the text of IIRIRA as a whole, and in the principle that "[w]hen Congress includes a provision that specifically addresses the temporal effect of a statute, that provision trumps any general inferences that might be drawn from the substantive provisions of the statute." *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 897 (1996); see also *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 586 (1983) ("in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute * * * and the objects and policy of the law").

Thus, judicial review of any final orders of deportation that are ultimately entered in respondents' cases will be governed by former 8 U.S.C. 1105a (1994)–-the judicial review

provision that was the pre-IIRIRA analogue to new Section 1252(a) and (b). Contrary to respondents' suggestion (see Br. 38), that approach does not render Section 1252(g) irrelevant to this case. As we note above (see pp. 4-5 *supra*), the purpose of Section 1252(g) is not to establish procedures for judicial review of deportation decisions. Rather, Section 1252(g) serves to make absolutely clear that the INA review provisions are exclusive, and that review of the deportation process cannot be obtained under some more general provision. By providing that Section 1252(g) applies "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings" (IIRIRA § 306(c)(1), as amended), Congress made clear that IIRIRA's express confirmation of the rule of exclusivity is immediately applicable to aliens such as respondents. Immediate application of that exclusivity principle is in no way inconsistent with Congress's determination that judicial review under the INA of any final order of deportation in respondents' cases will be governed by former Section 1105a rather than by new Section 1252(a) and (b).

2. Respondents contend that under pre-IIRIRA law, claims requiring factfinding beyond the administrative record could not be reviewed on appeal of a deportation order, and therefore were appropriately heard in a suit filed in district court.[3] Respondents then argue that the pre-IIRIRA

---

[3] Respondents assert (Br. 1): "The government agreed at the outset that selective enforcement claims could be heard only in an original district court action." In fact, the government filing on which respondents rely (Resp. Br. 1 n.2), at the very page they cite, stated (as a subject heading) that "The Court Lacks Jurisdiction to Address the Selective Enforcement Claim at This Time." Defendants' Memorandum in Response to the Court's Order of May 4, 1989, Concerning its Jurisdiction over Plaintiffs' Selective Prosecution Claim and the Effect of Declaratory Relief at 3 (filed May 25, 1989). The government argued (see *id.* at 3-8) that immediate adjudication of respondents' selective enforcement claim was inappropriate because it would disrupt the administrative process estab-

rules continue to authorize their suit. See Resp. Br. 21 & n.16. Those arguments lack merit, both because respondents misstate the jurisdictional rules that applied before IIRIRA was enacted, and because Section 1252(g) would divest the district court of jurisdiction of this case even if it had been properly brought in the first instance.

a. Respondents cite no case holding that the filing of deportation charges, or any other interlocutory step within the deportation process itself, could be subject to review in district court. Rather, the pre-IIRIRA cases they cite simply make clear that claims arising outside the deportation process fell outside the scope of former Section 1105a even if they were filed by a potentially deportable alien and could affect the alien's right to remain in the country. Contrary to respondents' contention, none of this Court's decisions has suggested that the applicability of former Section 1105a turned on whether factfinding was required. Rather, the Court has focused on whether the particular claims were properly regarded as challenges to an order of deportation.

Thus, in *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 216 (1968), the Court "h[e]ld that the judicial review provisions of [former Section 1105a] embrace only those determinations made during a proceeding conducted under [former 8 U.S.C. 1252(b) (1994)], including those determinations made incident to a motion to reopen such proceedings." The Court concluded that review of a district director's denial of a stay

---

lished by Congress. The government also suggested the possibility that "the court of appeals may remand the case to the district court for an evidentiary hearing" in the event that an alien is able to make a prima facie showing of selective enforcement after exhaustion of administrative remedies. *Id.* at 4. The government's statement (*id.* at 3) that "to the extent that it is appropriate for any court to entertain a selective enforcement challenge to the issuance of an Order to Show Cause, jurisdiction is in the district court," appears to have been nothing more than a recognition that no *other* court could plausibly be thought to have jurisdiction prior to the completion of administrative proceedings.

of deportation was not governed by Section 1105a. See 392 U.S. at 212-217. The Court observed, *inter alia*, that the denial of a stay "was issued more than three months after the entry of the final order of deportation, in proceedings entirely distinct from" the deportation proceeding. *Id.* at 212-213 (footnote and internal quotation marks omitted); accord *INS* v. *Stanisic*, 395 U.S. 62, 68 n.6 (1969); *INS* v. *Chadha*, 462 U.S. 919, 938-939 (1983).[4] Nothing in *Cheng Fan Kwok* or its progeny in this Court supports the unlikely proposition that the filing of deportation charges in the immigration court is "entirely distinct" from the deportation proceedings themselves.

b. As we explain in our opening brief (at 23-24 & nn. 9-11), the reason that the filing of deportation charges was unreviewable under the pre-IIRIRA regime was not simply that former Section 1105a precluded such review. There was, in addition, no statutory provision affirmatively authorizing it. No provision of the INA, either before or after IIRIRA, suggests that the filing of deportation charges is subject to immediate judicial review. The Administrative Procedure Act (APA) furnishes the mechanism for judicial review of federal agency action in the absence of more specific statutory review provisions. Review under the APA, however, is confined to "final agency action." See 5 U.S.C. 704. Respondents do not contend that the filing of administrative charges is "final agency action" within the meaning of the APA, and this Court's decision in *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232, 239-245 (1980), makes clear that it is not. See Gov't Br. 23-24 & nn. 9-10. Indeed, neither respondents' complaint nor their brief in this Court makes *any* attempt to identify a statutory provision that affirma-

---

[4] The court of appeals decisions cited by respondents (Br. 22 & nn. 17-18) likewise concerned almost exclusively decisions made by a district director that were entirely distinct from the deportation proceedings.

tively authorizes their suit or waives the sovereign immunity of the federal government.[5]

c. Finally, even if respondents' district court challenge to the filing of deportation charges had been properly brought

---

[5] Both in their complaint and in their brief in this Court, respondents have identified 8 U.S.C. 1329 and 28 U.S.C. 1331 as jurisdictional bases for their suit. See Resp. Br. 2, 42-43; J.A. 22. Respondents' apparent premise is that the existence of a general jurisdictional statute provides a sufficient basis for suing the federal government unless some other statutory provision specifically precludes the suit. That is not the law. Rather, "[t]he United States, as sovereign, is immune from suit save as it consents to be sued." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). And "[w]aivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33 (1992) (internal quotation marks omitted).

Awareness of the APA's "final agency action" requirement is crucial to understanding the development of the INA's review procedures. Before the 1961 amendments to the INA, review of a final order of deportation was available in district court under the APA. See *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955); Gov't Br. 21 n.7. The 1961 amendments altered that regime by making review in the court of appeals pursuant to the Hobbs Act "the sole and exclusive procedure for[] the judicial review of all final orders of deportation." 8 U.S.C. 1105a (1964); Gov't Br. 21 n.7. As amended in 1961, the INA did not in terms declare that non-final agency actions (such as the filing of charges) within the deportation process were immune from immediate judicial review. Such a provision was unnecessary, however, because Section 1105a(c) (1964) required exhaustion of administrative remedies and because non-final actions would not have been subject to APA review to begin with. See 5 U.S.C. 1009(c) (1964) ("Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.").

Section 1252(g) now explicitly confirms what was evident in any event from the text and structure of Section 1105a and the APA. Section 1252(g) states that the review provisions of the INA are exclusive not only with respect to the final order of deportation itself, but also with respect to "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under" the INA.

under pre-IIRIRA law, the suit clearly was not brought under Section 1105a itself. Section 1105a provided for review only of final orders of deportation, required exhaustion of administrative remedies, and established exclusive jurisdiction in the courts of appeals. For that reason, if the district court had jurisdiction to hear this suit at all, it could only have been under some other grant of authority. New Section 1252(g), however, precludes reliance on any more general statutory review provision when, as here, the plaintiff's claim "aris[es] from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." 8 U.S.C. 1252(g) (Supp. II 1996). Section 1252(g) thus requires dismissal of respondents' suit, regardless of whether that suit was properly brought under pre-IIRIRA law when it was first filed.

3. Respondents' reliance (Br. 22-23) on *McNary* v. *Haitian Refugee Center*, 498 U.S. 479 (1991), is misplaced. *McNary* did not involve a challenge to the filing of deportation charges, or to any other interlocutory action within the deportation process. Rather, it involved a class-action challenge to entirely separate administrative procedures used by the INS in adjudicating applications for special agricultural worker (SAW) status under the Immigration Reform and Control Act of 1986 (Reform Act). The Court began its analysis by identifying "matters that are not in issue." *Id.* at 490. It stated, *inter alia*, that "[the government's] argument assumes that the District Court would have federal-question jurisdiction over the entire case if Congress had not" included a preclusion-of-review provision in the Reform Act. *Id.* at 491.[6] The Court held that that preclusion provision–-

[6] The denial of an application for SAW status would surely have been "final agency action" subject to review under the APA if review had not been precluded by the Reform Act. See *McNary*, 498 U.S. at 490-491 (describing benefits that SAW status entails and hardships that denial imposes).

which generally barred a district court challenge to "a determination respecting an application for adjustment of status" (see *id.* at 486 n.6)–-did not divest the district court of authority to adjudicate a systemic challenge to INS policies regarding the SAW program. See *id.* at 490-494.

The instant case is distinguishable from *McNary* in two fundamental respects. First, although the Court in *McNary* observed that adjudication of the plaintiffs' claims would require considerable factual development, see 498 U.S. at 493, 497, it did not suggest that the need for factfinding could justify disregard of clear statutory limits on district court jurisdiction. Rather, it examined the language of the preclusion-of-review provision and concluded that the provision was inapplicable, by its terms, to the plaintiffs' suit. See *id.* at 491-494. It noted, in that regard, that Congress "could easily have used broader statutory language" if it had intended to foreclose review of the plaintiffs' systemic challenge. See *id.* at 494. Section 1252(g), by contrast, applies unambiguously to respondents' challenge to the filing of deportation charges.

Second, the starting point for the *McNary* Court's analysis–-the Court's assumption that judicial review would have been available if not for the Reform Act's preclusion provision–-is inapplicable to this case. As we explain above (at 8-9) and in our opening brief (at 23-24 & nn. 9-11), no statutory provision affirmatively authorizes judicial review of the filing of administrative charges, either generally or in deportation proceedings. Thus, quite apart from Section 1252(g)'s preclusion of review, nothing in *McNary* suggests that the agency action challenged by respondents is the sort of (final) action that is reviewable to begin with.

C. Dismissal Of This Suit Will Not Deprive Respondents Of A Judicial Forum For Their Claims

As we explain in our opening brief (at 44-49), the Hobbs Act would permit a court of appeals reviewing a final order of deportation to transfer the case to a district court if

adjudication of a selective enforcement claim required resolution of factual issues. See 28 U.S.C. 2347(b)(3). Respondents' brief repeatedly invokes the principle that statutes should be construed, if reasonably possible, to facilitate review of constitutional challenges to federal agency action. References to that principle are notably absent, however, from respondents' discussion of Section 2347(b)(3). Rather, the basic structure of respondents' argument is that (1) judicial review of their selective enforcement claims must be available either now or after the entry of a final deportation order; (2) Section 2347(b)(3), construed parsimoniously, will not permit a transfer to district court for development of an adequate factual record; and (3) the INS's decision to file deportation charges must therefore be subject to immediate district court review. That approach is seriously flawed.

1. Respondents assert: "The government concedes that [respondents'] claims must be subject to judicial review." Resp. Br. 14; see also *id.* at 18. That is a misstatement of the government's position. Our opening brief acknowledges that, under this Court's precedents, denial of all judicial review of a colorable constitutional claim would raise a serious constitutional question. Gov't Br. 36-37. We also believe that Section 2347(b)(3) on its face permits transfer to a district court, in an appropriate case, for resolution of a substantial selective enforcement challenge to a final order of deportation. It is far from clear, however, that the Constitution actually *requires* Congress to provide a judicial forum for a selective enforcement claim in the deportation context, if neither the substantive ground of deportation nor the administrative hearing is tainted by any constitutional violation.

That question need not, however, be resolved at the present time. If respondents are ultimately subjected to final orders of deportation, and thereafter seek to pursue their selective enforcement claims, the reviewing court of appeals will be required to determine whether Section 2347(b)(3) (or

some other provision for resolving material factual issues, see, *e.g.*, Fed. R. App. P. 48 (special masters)) may appropriately be invoked. If the court concludes that no mechanism for resolving those claims is available, it will then be obliged to decide whether respondents are constitutionally entitled to adjudication of their selective enforcement challenge. If the court finds that such an entitlement exists, it will fashion an appropriate mechanism–-most likely a procedure similar to a Section 2347(b)(3) transfer. Thus, even assuming that respondents are constitutionally entitled to judicial review of their selective enforcement claims, dismissal of this suit cannot possibly deprive them of that right.

2. Both before and after enactment of IIRIRA, the INA has provided that a court of appeals in reviewing a final order of deportation shall decide the case based solely on the administrative record compiled during the agency proceedings. 8 U.S.C. 1252(b)(4)(A) (Supp. II 1996); 8 U.S.C. 1105a(a)(4) (1994). Respondents read that requirement as precluding a transfer to district court pursuant to 28 U.S.C. 2347(b)(3). See Resp. Br. 24-25. As we explain in our opening brief (at 47 n.22), however, the requirement that review be based upon the administrative record does not prescribe a special rule for immigration cases, but simply restates a generally applicable rule of administrative law. The evident purpose of limiting the court of appeals' review to the administrative record, moreover, is to ensure that the agency has the initial opportunity to consider any evidence bearing on the appropriate disposition of the case. That purpose is hardly served by respondents' proposed approach, which would permit judicial review of the initial charging decision before completion of the administrative proceedings.

Respondents also observe (Br. 27-28) that transfer under the Hobbs Act is available only when "the agency has not held a hearing before taking the action of which review is sought" (28 U.S.C. 2347(b)) and "a hearing is not required by law" (28 U.S.C. 2347(b)(3)). Because the INS is required to

conduct a hearing before issuing a final order of deportation, respondents contend that a Section 2347(b)(3) transfer is unavailable when a court of appeals reviews such an order. The INS is not, however, required to hold a hearing before the filing of deportation charges–-the action that respondents claim was taken in violation of their constitutional rights—and no such hearing was held in this case. If respondents are ultimately subjected to final orders of deportation and seek to pursue their selective enforcement claims, the charging decision itself would properly be regarded as "the action of which review is sought," thus making transfer under Section 2347(b)(3) available. That result would fulfill the purpose of the Hobbs Act of ensuring the availability of an adequate mechanism for taking evidence within the framework of that Act itself. See S. Rep. No. 2618, 81st Cong., 2d Sess. 4 (1950) ("The bill has adequate provisions in section 7(b) and (c) [28 U.S.C. 2347(b) and (c)] for the taking of evidence either by the agency or in the district court, when for one reason or another that is necessary because a suitable hearing was not held prior to initiation of the proceeding in the court of appeals."); accord H.R. Rep. No. 2122, 81st Cong., 2d Sess. 4 (1950). As we have explained (Gov't Br. 46 & n.21), Congress, in enacting IIRIRA, foreclosed one mechanism in the Hobbs Act for taking additional evidence (a remand to the agency pursuant to 28 U.S.C. 2347(c)), since new evidence can be presented on a motion to reopen the order of deportation, but it left in place for removal cases the Hobbs Act's provision for transfer to the district court pursuant to 28 U.S.C. 2347(b)(3) where there is no opportunity for a hearing on the issue before the BIA.[7]

---

[7] Respondents rely (Br. 26) on the fact that the Senate version of the IIRIRA bill would have specifically provided for transfer to the district court if the court of appeals finds that a petition for review raises a constitutional question that presents a genuine issue of material fact. That provision was added on the Senate floor, without debate, as part of an

Respondents contend that the approach we advocate would complicate the adjudication of petitions for review in immigration cases. See Resp. Br. 28 ("On the government's view, * * * deciding whether to transfer a matter under § 2347(b)(3) would become a routine part of appellate courts' work in immigration cases."). That concern is without basis. In the first place, as our opening brief explains (at 48), transfer under Section 2347(b)(3) is appropriate only in the rare case where the issue cannot be resolved by the court of appeals on the basis of the pleadings and affidavits (see 28 U.S.C. 2347(b)(2)), and the facts necessary to resolve it were not and could not have been adequately developed in the course of the administrative proceedings. Furthermore, contrary to respondents' assertion (Br. 29), the Hobbs Act's assignment of a "gatekeeping" role to the court of appeals before a fact-based collateral challenge to a final deportation order is instituted in the district court substantially *furthers*

---

amendment that also contained the substance of what was ultimately enacted as 8 U.S.C. 1252(b)(9) (Supp. II 1996), which provides that judicial review of all issues involving interpretation or application of constitutional provisions is available only on review of a final order of removal. See 142 Cong. Rec. S4595-S4596 (daily ed. May 2, 1996); see also *id.* at S4740 (daily ed. May 6, 1996) (H.R. 2202, § 142(a), as it passed the Senate). The provision for transfer to the district court where a constitutional issue is presented was omitted by the Conference Committee, again without explanation. The most likely reason, however, is that the Hobbs Act, in 28 U.S.C. 2347(b)(3), *already* provided for transfer of such cases, see, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)–-perhaps coupled with a reluctance on the part of a Congress intent on expediting the removal process to lend any credence to fact-based constitutional claims such as those presented here. It is, in any event, implausible to suggest that by deleting the provision, Congress intended to permit review of constitutional claims outside the self-contained framework of the Hobbs Act, since Congress retained the portion of the same amendment that requires *all* constitutional claims to be raised in the court of appeals on review of a final order of deportation, so as to ensure consolidation and expedition of all judicial review.

the statutory goal of the INA and IIRIRA of consolidating all challenges to removal proceedings in the courts of appeals and expediting completion of those proceedings. Compare *Felker* v. *Turpin*, 518 U.S. 651, 656-657 (1996); *Hohn* v. *United States*, 118 S. Ct. 1969, 1972 (1998).[8]

3. Our reading of Section 2347(b)(3) is far more consistent with the text of the relevant statutes, and with the manifest intent of Congress to consolidate and expedite all judicial review in the court of appeals, than the approach espoused by respondents. The government's interpretation of Section 2347(b)(3)–-unlike respondents' construction of Section 1252(g) (as well as Section 1252(b)(9) and (f) and IIRIRA's effective date provisions)–-is fully consistent with the text of both the INA and the Hobbs Act. Our approach also effectuates IIRIRA's overarching directive that a judicial challenge to the deportation process must await the entry of a final order–-a directive that is itself consistent with background principles of administrative law.

For the foregoing reasons, a Section 2347(b)(3) transfer would be available if, on review of any final orders of deportation that may be entered against respondents, a reviewing court were to find that they made a substantial showing of unconstitutional selective enforcement—and that such a claim could render a deportation order invalid, notwithstand-

---

[8] Contrary to respondents' assertion (Br. 14, 18), we do not concede that respondents' claims require factual development of the sort that would necessitate transfer to the district court pursuant to 28 U.S.C. 2347(b)(3) even if we assume *arguendo*, that a selective enforcement challenge is viable in this setting. An affidavit by the responsible INS official that respondents' fundraising on behalf of the PFLP led to the referral to the INS and the institution of charges would furnish a "facially legitimate and bona fide reason" for INS's actions (see *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972); Pet. 20-30), and a fully sufficient basis for the court of appeals to dispose of the claim. See also Pet. 28-29 (discussing this Court's cases permitting deportation of aliens who have engaged in meaningful activities with foreign-dominated subversive groups).

ing the continuing nature of the INA violation and the compelling countervailing interests at stake. Compare *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1046-1050 (1984). This Court need not resolve those issues, however, in order to determine that the instant suit must be dismissed. IIRIRA unambiguously precludes the district court from exercising jurisdiction over respondents' current claims. The Court may order the suit dismissed on that basis, leaving for another day the question how, if at all, their selective enforcement claims should be reviewed in the event that some or all of the respondents are ultimately subjected to a final order of deportation. See pp. 12-13, *supra*.

D. The Constitution Does Not Require Immediate Judicial Resolution of Respondents' Claims

Respondents contend that review of their selective enforcement claims after entry of a final order of deportation "is patently inadequate, because it would leave them with no judicial recourse for their irreparable First Amendment injuries" during the pendency of the administrative proceedings. Resp. Br. 30. They further assert that "[f]ew principles are more basic to First Amendment jurisprudence than the notion that First Amendment claims require prompt judicial review." *Id.* at 31. None of the cases they cite, however, suggests that an Act of Congress is unconstitutional if it defers constitutional challenges to federal agency action until the completion of administrative proceedings.

1. Even where a defendant contends that a criminal prosecution was brought against him for a constitutionally impermissible reason, "reversal of the conviction and * * * the provision of a new trial free of prejudicial error normally are adequate means of vindicating the constitutional rights of the accused." *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 268 (1982). See also, *e.g.*, *Standard Oil*, 449 U.S. at 244 (obligation to participate in administrative adjudication is not irreparable injury). Respondents identify no

current constraints on their freedom of action beyond those associated with the deportation process itself. Their claim instead is that they are presently "chilled" (Resp. Br. 36) from engaging in PFLP-related activities, and that a favorable judicial ruling will eliminate the chill. Congress is not obligated, however, to provide a plaintiff with immediate access to a federal judicial forum whenever the plaintiff alleges that uncertainty as to the scope of his First Amendment rights discourages him from engaging in expressive or associational activities.[9]

2. The Constitution has been held to require prompt access to a judicial forum when an individual's right to engage in expressive activity is conditioned on the prior approval of a government official. See Resp. Br. 31 & n.27 (citing *Freedman* v. *Maryland*, 380 U.S. 51 (1965) and *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975)). Respondents acknowledge (Br. 31 n.27) that no prior restraint is involved in this case. They contend, however, that selective enforcement based on the exercise of First Amendment rights "has many of the same effects and should raise the same concerns as do prior restraints." *Ibid.* That argument stands this

---

[9] Some of respondents' assertions regarding the chilling effect of the pending deportation proceedings are incredible on their face. Respondents state that they have "bec[o]me afraid to engage in even the most basic political activities, including reading magazines, discussing political issues publicly, and supporting the peace process in the West Bank." Resp. Br. 7. Nothing in the record suggests that the INS has taken adverse action against respondents, or anyone else, based on such activities. Moreover, the selective enforcement of which respondents complain can "chill" their continued participation in fundraising and other PFLP activities only if respondents (1) intend to commit future violations of the immigration laws but believe that the INS will forgo the filing of charges so long as they refrain from associating with the PFLP, or (2) anticipate that the charges based on their past violations will be dropped if they discontinue their activities. The first assertion obviously would provide no basis for immediate judicial review. Respondents have not alleged that the second proposition is true, and nothing in the record supports it..

Court's prior restraint jurisprudence on its head. The guiding premise of that jurisprudence is that a requirement of prior official approval for communicative activities poses special dangers to First Amendment rights and accordingly should be subject to special constraints. See *Freedman*, 380 U.S. at 57-58; *Southeastern Promotions*, 420 U.S. at 552-562. Respondents may not invoke the extraordinary procedural safeguards applicable to prior restraints by arguing that there is nothing special about prior restraints after all.

3. Recognition of a First Amendment right to immediate judicial review in this setting would have far-reaching implications. Such a right could not plausibly be confined to the context of immigration, but would presumably override statutory exhaustion and finality requirements, no matter how unambiguous, in all administrative settings.[10] Nor could such a right be limited to claims of selective enforcement. Because administrative officials ordinarily lack authority to resolve constitutional challenges to their governing statutes, see *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975), recognition of a right to immediate review in the present case would imply a similar right where the statute under which an administrative action is taken is alleged to "chill" activities that are protected by the First Amendment.[11]

---

[10] As we explain in our opening brief (at 39-40), this Court has shown particular deference to Congress's decisions regarding the terms on which aliens will be permitted to enter and remain in the country. IIRIRA reflects Congress's determination that judicial review of the deportation process must await completion of administrative proceeings. If First Amendment claims are constitutionally exempted from that requirement even in the deportation context, it is difficult to see how exhaustion principles could be applied to such claims in any administrative setting.

[11] At an early stage of this case, the district court held that respondents Hamide and Shehadeh could not obtain immediate judicial review of their First Amendment challenge to the substantive INA provisions under which they were alleged to be deportable. The court explained that Hamide and Shehadeh were required to exhaust their administrative

4. It is a fundamental principle of federal adjudication that courts should not resolve constitutional questions in advance of the necessity of doing so. See, *e.g.*, *Ashwander* v. *TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring). Administrative exhaustion principles serve in part to prevent the courts from prematurely deciding constitutional issues whose resolution might ultimately prove unnecessary. See *Salfi*, 422 U.S. at 762. In the instant case, however, the court of appeals issued a constitutional ruling with potentially sweeping implications for national security and foreign policy (see Pet. 20-29) before the responsible Executive Branch officials had even determined whether respondents were deportable. The Constitution does not require such a departure from *Ashwander* principles simply because respondents' claims arise under the First Amendment.

* * * * *

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be vacated, and the case should be remanded with instructions that the complaint be dismissed for lack of jurisdiction.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

OCTOBER 1998

---

remedies, and that review of their constitutional claim would be available in the court of appeals if and when they were subject to a final deportation order. Pet. App. 194a-195a. Respondents Hamide and Shehadeh did not appeal that ruling. *Id.* at 171a. If the First Amendment entitles respondents to immediate judicial review of their selective enforcement claims, however, it is not clear why the same rationale would not give rise to a right of immediate review of the contention that the statutory provisions governing their deportability are themselves unconstitutional.